87-1984

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.

OCTOBER 1988 TERM

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Willard J. Moody, Sr.
Raymond H. Strople
MOODY, STROPLE & LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705
(804) 393-4093

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED FOR REVIEW

I

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE DOES THE INJURED RAILROAD EMPLOYEE HAVE A RIGHT TO HAVE THE ISSUE OF THE RAILROAD'S NEGLIGENCE REMOVED FROM THE JURY WHERE REASONABLE PEOPLE COULD ONLY CONCLUDE THAT THE RAILROAD WAS NEGLIGENT.

II.

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE SHOULD THE COURT REMOVE THE ISSUE OF LIABILITY FROM THE JURY WHERE THE RAILROAD EMPLOYEE'S EVIDENCE SHOWS AS A MATTER OF LAW THAT THE RAILROAD'S NEGLIGENCE WAS A CAUSE IN WHOLE OR IN PART OF THE RAILROAD EMPLOYEE'S INJURY.

III.

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE DOES THE INJURED RAILROAD EMPLOYEE HAVE A RIGHT TO HAVE THE COURT

RULE AS A MATTER OF LAW THAT THE INJURED EMPLOYEE WAS FREE OF CONTRIBUTORY NEGLIGENCE WHERE REASONABLE PEOPLE COULD ONLY CONCLUDE THAT THE INJURED RAILROAD EMPLOYEE WAS NOT NEGLIGENT.

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS

This case has not been reported in any official or unofficial reports either at the trial level or at the appellate level.

GROUNDS OF JURRISDICTION

The Circuit Court of Portsmouth on December 29, 1986 entered judgment on the jury verdict for the Seaboard System Railroad. A Petition for Appeal was timely filed by Thomas with the Supreme Court of Virginia and the Petition for Appeal was denied by the Supreme Court of Virginia on January 25, 1988. (See Appendix p.vii) A Petition for Rehearing was filed in the Supreme Court of Virginia and the rehearing was denied by the Supreme Court of Virginia on March 4, 1988. (See Appendix p. ix-x) This Petition for Writ of Certiorari is timely filed in accordance with 28 U.S.C. 2101(c)

This Court has jurisdiction in accordance with 28 U.S.C. Section 1257(3), which provides:

> By Writ of Certiorari, where the validity of a treaty

or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissioned held or authority exercised under, the United States.

STATUTE INVOLVED

Section 51 of the Federal Employers' Liability Act provides, "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then the next of kin depending upon such employee, such injury or death resulting in whole or in part from the negligence in any of the officers, agents or

employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment. See 45 U.S.C. Section 51 Federal Employers' Liability Act.

STATEMENT OF CASE

Thomas filed a Motion For Judgment against the Seaboard under the Federal Employers' Liability Act seeking damages for an on the job injury that he sustained while in the employ of the Seaboard on January 17, 1985 due to the failure of the Seaboard to furnish him with a safe place to work. The Seaboard denied that Thomas was injured, denied that he was negligent and alleged that Thomas was negligent. The matter was tried before a jury in the Circuit Court of Portsmouth on September 8, 9, 10, and 11, 1986. Before the matter was submitted to the jury Thomas asked the Court to grant Instruction 1-A, which provided that the Seaboard was negligent as a matter of law and asked the Court to grant Instruction 3-A which provided that Thomas was free of negligence as a

matter of law (See Appendix p. x-xi).

Instruction 1-A and 3-A were denied by the Court (See Appendix xii). The jury then returned a verdict for Seaboard. Thomas then moved to set aside the verdict and award him a new trial on the basis the verdict was contrary to the law and evidence and the error in refusing to grant certain instructions (See Appendix p. iv, v and vi). The Circuit Court on December 29, 1986 overruled Thomas' post-trial motion and affirmed the jury verdict (See Appendix vii-viii). Thomas then filed his Petition For Appeal, which was timely filed, and argued before the Supreme Court of Virginia that the jury verdict was plainly wrong and without evidence to support it and asked the Court to set aside the verdict and award Thomas a new trial on damages. Thomas also argued in the Petition For

Appeal that the Court should have ruled that Thomas was free of negligence as a matter of law and that the Seaboard was negligent as a matter of law. The Petition For Appeal was denied on January 25, 1988 (See Appendix p. viii). A Petition For Rehearing was then filed where it was argued that the jury verdict was plainly wrong and without evidence to support it and asked that the verdict for the Seaboard should be set aside and award Thomas a new trial on damages. The Petition For Rehearing was denied on March 4, 1988 (See Appendix p. ix-x).

Page references in this Petition will be to the transcript unless the matter has been printed in the Appendix attached, in which case the reference will be to the Appendix filed with this Petition.

Thomas, a railroad brakeman, reported to work at the Brewer Yard in Danville, Illinois on January 17, 1985 at 2:30 a.m. Thomas boarded the caboose with Peckinpaugh, a fellow employee. The weather was clear and the temperature was 20° (T-53). The train could not leave because the air had to build up to 75 pounds in the air brakes in the caboose (T-136, 196). When Thomas boarded the caboose the lights and radio were not working (T-37, 38, 196-197). The battery had enough power to light the red light at the rear of the caboose, but would not light the lights inside the caboose. A trainmaster for the Seaboard, a supervisor of Thomas, boarded the caboose while they were waiting for the air to build up in the caboose and was aware that the lights were not on and the radio was not working

(T-198, 38, 39). Nevertheless, the trainmaster instructed Thomas to leave with the lights and radio not working.

The train left the Brewer Yard around 6:35 a.m., with Peckinpaugh seated on the right side of the caboose and Thomas seated on the left side (T-40, 199). The interior of the caboose was dark and noisy (T-41, 199). Some time between 7:00 and 7:20 a.m., Thomas heard the radio cut in (T-200). At this time it was just breaking dawn and was 50% darker inside the caboose then outside (T-202). It was agreed that at the time it was darker inside the caboose (T-42, 53, 54). Because of the noise the radio was starting to make Thomas intended to get up and turn the volume up (T-200). As Thomas got up he hit the light switch above his seat and a little glow was produced by the interior light.

Thomas took one step West when his foot hit water and started sliding until he hit a dry spot, suddenly stopping causing Thomas severe pain (T-200, 234, 236). Thomas, at the time of fall, was partially lying in water. Thomas picked himself up and sat in the seat and looked at his ankle and noticed that the bone in his ankle was sticking through the skin of his leg (T-200). Peckinpaugh saw Thomas stand up but did not hear or see Thomas fall. Peckinpaugh then heard Thomas moaning (T-42) and helped Thomas reduce the swelling and applied a trashbag with ice (T-42). Peckinpaugh determined, by examining Thomas' ankle with a lantern, that Thomas was seriously injured and needed help. Peckinpaugh used a walkie talkie (radio in caboose was not working) to advise the engineer of the injury

and the need for medical assistance (T-44,45).

Neither Thomas nor Peckinpaugh were aware of water on the floor of the caboose prior to Thomas' fall. After the accident water was observed on the floor of the caboose with the biggest portion being under the water cooler and under Thomas' seat (T-130, 136). Because of the battery condition, the lights in the caboose did not provide enough light to see (T-44, 53). Thomas had a hand held lantern but maintained that he did not use the lantern when he got up because the lantern was used for signaling and spotting, and was not used inside cars, or inside the caboose (T-61, 203).

Evidence showed that water came from the water cooler. The drainpipe of the water cooler would freeze and

backup the water from the cooler causing it to spill on the floor (T-49). Complaints had been made about the drainpipe freezing causing the water to flow on the floor prior to Thomas' fall (T-151, 152, 162). Railroad employees had used the railroad fusees in the past to thaw the drainpipe and pictures showed evidence of a burned drainpipe.

Hart, a car inspector, indicated that there was not enough employees at the Brewer Yard to inspect cabooses (T-160) and verified that complaints about the drainpipe freezing had been made prior to Thomas' fall (T-162). Vaughan inspected the caboose after Thomas' injury, and found water on the floor that came from the drainpipe of the water cooler (Vaughan-6). Vaughan explained that the drainpipe in the caboose would have a tendency to freeze

in cold weather and an inspection right after the accident showed that the drainpipe was frozen with icicles hanging from it (Vaughan-7, 9). A solid plug of ice in the drainpipe stopped the water draining from the drainpipe causing the water to overflow onto the floor. The Seaboard officials were aware that the drainpipes had frozen for some time, (Vaughan-15) but the Seaboard had not taken any action to stop the drainpipe from freezing (T-5, 138).

Expert opinion introduced into evidence indicated the drainpipe froze because the Seaboard used a flat fitting instead of a slope fitting pipe (T-87). Spicer, a plumber who was familiar with the condition and pipe layout of the caboose, was of the opinion that the condition of the freezing pipe could have been alleviated by using heating

tape (T-88), insulation and pipe fittings (T-89), boxing the drain (T-90), or Rubatex (T-91). Vaughan, a car inspector, was of the opinion that the drainpipe would not have frozen if a three or four inch pipe had been used.

The Seaboard offered no evidence to dispute the fact that the trainmaster ordered the caboose to leave without lights, the Seaboard knew the pipe would freeze, that the Seaboard had prior complaints about the drainpipe freezing, that the condition of the freezing drainpipe could be corrected, or that it was dark in the caboose. The Seaboard maintained that Thomas did not fall in the water and that Thomas should have used his lantern before he moved. No other explanation was given as to how Thomas was injured.

REASONS FOR GRANTING WRIT

In the past this Court, in Federal Employer Liability Act cases, has been confronted with the issue as to whether there was error in not having the case submitted to the jury and not the issue as to whether there was error in submitting the case to the jury. This Court has reviewed cases by Certiorari where the Lower Court has struck the employee's evidence and has ruled as a matter of law that either the employee was negligent, the employer was free of negligence, the employer's negligence was not causally related or there was not an employment relationship. In these cases the Court held there was error in not submitting the issue of the employee's negligence, the employer's negligence, the question of causation or the employment relationship to the

jury. See Tenant v. Peoria and Pekin Union R. Company, 321 U.S. 29, 88 L.Ed. 520, 64 S.Ct. 409 (1944); see Jesionowski v. Boston and Main Railroad, 329 U.S. 452, 91 L.Ed. 416, 67 S.Ct. 401 (1947); see Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413 (1949); see Tiller v. Atlantic Coastline Railroad Company, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943); see Rogers v. Missouri Pacific P.R. Company, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957), Reh Den 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957); see Baker v. Texas and Pacific Railway Company, 359 U.S. 227, 3 L.Ed.2d 756, 79 S.Ct. 664 (1959); see Webb v. Illinois Central Railroad, 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 459, Reh Den 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 809 (1957).

In contrast to the previous cases where this Court has granted Certiorari the Petitioner here is seeking Certiorari on the basis that the Lower Court should not have submitted the issue of the employee's negligence, the employer's negligence and the causation to the jury. "If reasonable men could not reach different conclusions on the issue the question may be taken from the jury." See Baker, supra. This Court should grant Certiorari because the Supreme Court of Virginia has decided an important Federal question of sufficiency of evidence which is in conflict with other decisions of the Supreme Court and other Federal decisions in interpreting the Federal Employers' Liability Act. "Only by a Uniform Federal Rule as to the necessary amount of evidence may litigants under the Federal

action receive similar treatment in all States." See Brady v. Southern Railway Company, 320 U.S. 476, 88 L.Ed. 239 at 242, 64 S.Ct. 232 (1943). The Portsmouth Circuit Court's ruling and the Supreme Court of Virginia's ruling that there was no error in submitting the question of the employer's negligence, the employee's negligence and the issue of causation to the jury was a Federal question. See Brady, supra. "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict, or otherwise in accordance with acceptable practice without submission to the jury or by judgment not withstanding the verdict." See Brady, supra., p. 243.

It is important that this Court review this case because the Circuit Court of Portsmouth and the Supreme Court of Virginia have not followed the standard of the review of evidence as set down by this Court and other Federal Court decisions interpreting the Federal Employers' Liability Act. The Supreme Court of Virginia allowed the issue of the Seaboard's negligence to go to the jury where the uncontradicted evidence was that the interior light of the caboose was not working, that the supervisor of the Seaboard knew this and ordered the crew to leave, that the Seaboard had received complaints about the drainpipe freezing prior to Thomas' accident, that the freezing of the drainpipe caused water to overflow on to the floor, that the drainpipe could have been repaired so it would not

freeze and that the frozen drainpipe caused water to flow on to the floor. Reasonable people could only conclude from the evidence and the inferences from the evidence that the Seaboard was negligent for allowing a condition to exist causing an overflow of water on the caboose floor.

The Court also allowed the issue of Thomas' negligence to be submitted to the jury over the objection of Thomas. Thomas was told by a supervisor to ride in the car and leave the terminal with the car not having proper lights. Thomas either hit the light switch before he took his step or the light switch was already on but the light only provided a small glow. Thomas cannot assume the risk of his injury. See 45 U.S.C. Sec. 54. There was no evidence that Thomas got out of his seat improperly or was

taking an improper step or should have known that the water was there. It was agreed that it was dark inside the caboose. The Seaboard maintained that Thomas should have used his lantern but witnesses maintained that the lantern was not used for looking around inside the caboose. Thomas did not cause the drainpipe to freeze or the water to overflow. There was no evidence that Thomas knew of the water on the floor at the time he took his step, that Thomas improperly got out of his seat, or that Thomas should havc seen the water. There has been a number of Federal Circuit cases upholding the principle that the question of the employees' negligence should not be submitted to the jury if reasonable people could conclude the employee was not negligent. See Borough v. Diluth Missabe and Iron

Range Ry Company, 762 Fed.2d 66 (8th Circuit. 1985), where the 8th Circuit Court of Appeals found no evidence of contributory negligence and held it was an error to submit the issue to the jury. In Borough, the employee testified that he stepped off a moving train in a manner taught by and approved by the railroad and it was impractical for him to wait before he stepped off the train. There was no evidence from the two witnesses that Borough acted negligently and carelessly or stepped off improperly. There was evidence that the plaintiff knew of the presence of the taconite pellets on the platform might be dangerous but there was no evidence that he failed to use the proper care in alighting from the train. The Court said that if there was no evidence from which the jury could find, lack of due care by an

employee, it is generally fundamental error for the Court to give a contributory negligence instruction. See Borough, supra. In Wilson v. Burlington Northern, 670 Fed.2d 780 (8th Cir. 1982), Cert. Den. 457 U.S. 1128, 73 L.Ed.2d 1333, 102 S.Ct. 2934 (1982), the plaintiff was asked to assist in lifting a pan and injured his back. The Court held the issue of employee's negligence should not have been submitted to the jury. It was not contributory negligence for the plaintff to fail to use the jack when the jack had not been used for a year or to call for additional help. Here the plaintiff was asked to help and there was no choice involved. The Court said it is a reversible error to submit to the jury the issue of contributory negligence where there is not evidence for the jury to find a

lack of due care. See Wilson, supra., p. 784. In Morran v. Pennsylvania Railroad Company, 321 Fed.2d 402 (1963), the Court held there was no issue of the employee's contributory negligence when the employee was walking over a plank that was used for walking and it gave way. Evidence showed that the plank had become rotten on the underside but this was not visible to the employee. It is not contributory to fail to look out for danger when there is no reason to apprehend any. In Dixon v. Penn Central, 481 Fed.2d 833 (6th Cir. 1973), Dixon was in the tower and was giving a signal to operate the switch lever. The lever went half way up and stopped and the plaintiff pushed again and injured himself. Plaintiff was aware by custom to throw a switch that went that far and there was no evidence that

you would not throw the switch. The Court said that you cannot reach the jury on the issue which the defendant bears the burden of proof on nothing but the incredibility of the plaintiff's testimony. See Dixon, supra., p. 837. Finally in Paluch v. Erie Lackawanna Railroad, 387 Fed.2d 996 (3rd Cir. 1968), the railroad employee climbed a pole pursuant to the written instructions of his employer in order to cut a wire. Plaintiff was inexperienced in what he was told to do. The pole was rotten and it was held up by a stub-pole which was also rotten. The Court again said it was not contributory negligence to fail to discover a danger when there is no reason to apprehend one. Thomas had no reason to apprehend any danger in this case. The inside of the caboose was dark and Thomas went to flick on the

switch before he took a step and the light did not provide the normal lighting, which the railroad knew of before the caboose left the terminal. Thomas had no reason to apprehend that there was water on the floor as a result of the drainpipe of the water cooler becoming frozen. Thomas was not the cause of why the caboose was not well lighted and the Seaboard cannot shift this responsibility by saying that Thomas was contributory negligent by not using his lantern.

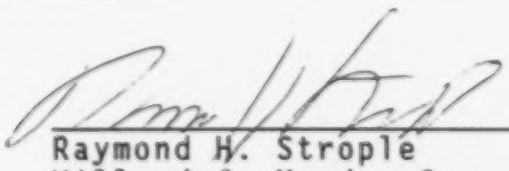
The Federal Employers' Liability Act protects the rights of the employee and the Court in allowing the issue of Thomas' contributory negligence to go to the jury and in allowing the question of the railroad's negligence to go to the jury where only reasonable men could conclude that Thomas was not

negligent and the railroad was negligent is contrary to the intent and purpose of the Federal Employers' Liability Act, that the decisions of the Supreme Court of the United States and the decisions of the other Circuits. This Court should grant this Petition of Certiorari.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner respectfully prays that this Court grant this Petition of Certiorari to review the decision of the Supreme Court of Virginia.

Respectfully submitted this 1st day of June, 1988.



Raymond H. Strople
Willard J. Moody, Sr.
MOODY, STROPLE & LAWRENCE
Post Office Box 1138
Portsmouth, VA 23705
Counsel for Petioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served William T. Prince at Williams, Worrell, Kelly & Greer, P.C., Post Office Box 3416, Norfolk, Virginia 23514-3416 counsel for respondent by mailing three copies of the Petition for Certiorari by depositing the same in the United State mail postage prepaid this 1st day of June 1988.

Raymond H. Strople
Willard J. Moody, Sr.
MOODY, STROPLE & LAWRENCE
Post Office Box 1138
Portsmouth, VA 23705

IN THE SUPREME COURT OF
THE UNITED STATES

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILWAY, INC.,

Respondent.

APPENDIX

VERDICT OF THE JURY

DOCKET NO.: L-85-760

September Term, 1986

THE CIRCUIT COURT
OF THE CITY OF PORTSMOUTH

STEPHEN R. THOMAS

v.

SEABOARD SYSTEM RAILROAD, INC.

VERDICT:
We, the jury, find for the Defendant, Seaboard System Railroad, Inc.

Byron S. Walker
Foreman
11 September, 1986

ORDER OF COURT ENTERED
SEPTEMBER 11, 1986

VIRGINIA: IN THE CIRUCIT COURT OF THE CITY OF PORTSMOUTH

STEPHEN R. THOMAS,

Plaintiff,

v. AT LAW NO L85-760

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this the 11th day of September 1986, again came the parties in person and by their Attorneys and Court convened as of its adjournment of Wed. Sept. 10th, 1986, and the jurors sworn to try the issue again retired to their room to consult of their verdict and after sometime returned into Court having found the following verdict: "We, the jury, find for the defendant, Seaboard System Railroad, Inc., signed Byron Walker, Foreman." Sept. 11th, 1986, whereupon, the plaintiff, by counsel, moved the Court to set the verdict of the jury aside and to grant him a new trial on the grounds that said verdict is contrary to the law and evidence for reasons stated in the record, which motion being heard, is taken under

advisement by the Court and the Attorney for plaintiff is to prepare the record of this case and said case is continued generally.

ENTER 9/11/86

MOTION TO SET ASIDE VERDICT AND AWARD A NEW TRIAL

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PROTSMOUTH

STEPHEN R. THOMAS,

Plaintiff,

v. L-85-760

SEABOARD SYSTEMS RAILROAD COMPANY,

Defendant.

MOTION TO SET ASIDE VERDICT OR AWARD A NEW TRIAL

NOW COMES PLAINTIFF, Stephen R. Thomas, by counsel, and in confirmation and supplementation of his verbal motion, respectfully moves the Court to set

aside the verdict of the jury in favor of the defendant and to enter final judgment for the plaintiff, or in the alternative, to award a new trial on the following grounds;

1) The Verdict of the jury was contrary to the law and the evidence in this case and was without evidence to support it.

2) The Court erred in granting and refusing instructions to the jury.

3) The Court erred in the admission and exclusion of evidence presented.

4) The Court erred in the denial of certain voir dire offered by the plaintiff.

5) Misconduct of the Jury.

6) The Court erred in allowing improper argument by defense counsel to the jury.

6) The Court erred in denial of argument to the jury by plaintiff's counsel.

Counsel for the plaintiff will further specify particulars of said motion once the trial record has been prepared for review.

WHEREFORE, plaintiff, Stephen R. Thomas, moves the Court to set aside the jury verdict and enter final judgment for the plaintiff, or in the alternative, to award a new trial.

STEPHEN R. THOMAS

By s/Willard J. Moody

Willard J. Moody, p.q.
MOODY, STROPLE AND LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705

I hereby certify that the original of the foregoing pleading was this 18th day of September, 1986, mailed to William T. Prince, Post Office Box 3416, Norfolk, Virginia 23514, counsel of record for the defendant.

s/Willard J. Moody

FINAL JUDGMENT OF THE
CIRCUIT COURT OF PORTSMOUTH

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

STEPHEN R. THOMAS,
Plaintiff

vs. AT LAW NO L-85-760

SEABOARD SYSTEM RAILROAD, INC.,
Defendant.

On this the 19th day of December, 1986, came again the parties by their Attorneys and the Court having fully heard the motion of the plaintiff to set the verdict of the jury aside heretofore rendered herein and to grant the plaintiff a new trial on the grounds that said verdict is contrary to the law and evidence, which motion the Court doth overrule and judgment is entered on the verdict. It is therefore

considered by the Court that the plaintiff take nothing by his false clamor and judgment be entered on the verdict rendered on the 11th day of September, 1986, and this case be removed from the docket of this Court.

Enter 12/29/86

s/Judge

ORDER OF SUPREME COURT OF VIRGINIA
DENYING PETITION FOR APPEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of January, 1988.

Stephen R. Thomas, Appellant,

against Record No. 870300
Circuit Court No. L-85-760

Seaboard System
Railroad, Inc., Appellee.

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: s/R. A. Rice
Deputy Clerk

ORDER OF SUPREME COURT OF VIRGINIA
DENYING PETITION FOR REHEARING

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in

the City of Richmond on Friday the 4th day of March, 1988.

Stephen R. Thomas, Appellant,

against Record No. 870300
Circuit Court No. L-85-760

Seaboard System
Railroad, Inc., Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of January, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/Clerk

INSTRUCTION 1-A

The Court instructs the jury that Seaboard System Railroad, Inc. was negligent as a matter of law for permitting the condition which resulted

in the overflow of water onto the floor of the caboose that is the subject of this case. If you believe from the greater weight of the evidence that such negligence on the part of the defendant Railroad caused or contributed in whole or in part, even the slightest, to cause the injury which Stephen R. Thomas sustained on January 17, 1985, then you shall return your verdict in favor of Stephen R. Thomas and fix his damages in accordance with the other instructions of the Court.

Refused

9/10/86

s/Judge

INSTRUCTION 3-A

The Court instructs the jury that there is no evidence that Stephen R. Thomas was negligent himself in causing or contributing to cause the accident

in which he was injured, and if you find for the plaintiff, you shall not consider any such contributory negligence to reduce the amount of your verdict.

Refused

9/10/86

s/Judge

* * * * * *

THE COURT: All right, gentlemen, we will take up instructions now.

(The jury was dismissed for lunch.)

(The following took place in chambers.)

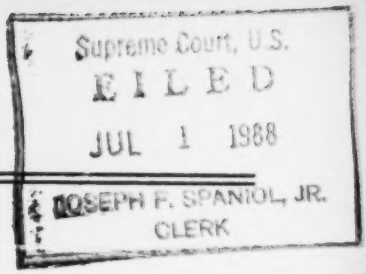
THE COURT: 1-A refused. I think it's a question for the jury. --

* * * * * *

THE COURT: All right, sir.

3-A refused on the grounds it's a jury question.

DOCKET NO. 87-1984



In the Supreme Court of the United States

October Term, 1988

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

William T. Prince, Esquire
Counsel of Record
WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
(804) 624-2600

Counsel for Respondent

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In the
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SEABOARD SYSTEM RAILROAD, INC.,

Respondent

BRIEF IN OPROSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE CASE

Pursuant to Rule 34 of the Rules of the United States Supreme Court, respondent Seaboard Systems Railroad, Inc. (Seaboard) offers the following facts to the Court in order to correct certain inaccuracies and omissions present in the petition for writ of certiorari of petitioner Stephen R. Thomas (Thomas).

A question at trial concerned the factual incredibility of Thomas' account of his injury. The petition for writ of certiorari omits the fact that, although Thomas' "whole leg turned around" (Transcript, p. 200), Thomas did not yell or make any noise when he allegedly fell. (Tr., p. 239.) Although the caboose contained some noise, the interior was

sufficiently quiet that both men could hear the crackle of the wall-mounted radio and could converse. (Tr., pp. 41-42, 234.) However, Peckinpaugh, who sat within a few feet of Thomas and saw him stand and sit, noticed nothing untoward until, approximately five minutes after Thomas sat down, he asked Peckinpaugh to examine his foot. (Tr., p.64.)

Another question at trial regarded whether Seaboard properly inspected the caboose in which Thomas rode. Thomas' petition for writ of certiorari states that "Hart, a car inspector, indicated that there was not enough employees at the Brewer Yard to inspect cabooses...." (Tr., p. 160, Petition for Writ of Certiorari, p. 14.) However, Hart, a union

official from Evansville, Indiana (Tr., p. 153), was attempting to testify about practices in Danville, Illinois. (Tr., p. 166.) Also, Hart admitted that he could not state that Seaboard had not properly inspected and maintained the caboose in which Thomas rode. (Tr., p. 171.)

Another question arose concerning the wisdom of the configuration of the drainage pipes in the caboose. At trial, Thomas relied upon one Spicer to show that the configuration was faulty. (Tr., p. 88.) In his petition for writ of certiorari Thomas refers to Spicer as "a plumber who was familiar with the condition and pipe layout of the caboose." (Petition, p. 15.) However, as Thomas stated in his petition for appeal to the Virginia

Supreme Court, "Spicer had not done any plumbing work on railroad cars or cabooses." (Petition for Appeal, p. 10.)

Thomas correctly states in his petition for writ of certiorari that the trial judge denied Thomas' proffered instructions regarding negligence and contributory negligence. However, the petition for writ of certiorari omits to mention that during the giving of instructions to the jury, Thomas did not object to the judge's submission of the issues of negligence, causation, and contributory negligence to the jury. (Tr., pp. 312-319.) Furthermore, until the post-trial hearing on Thomas' motion to set aside the verdict, Thomas never

claimed that he established causation as a matter of law. (Id.)

SUMMARY OF THE ARGUMENT

The Court has already decided the questions Thomas presents for review. Thomas' Questions Presented request the Court to proclaim the evidentiary standard for directing a verdict in a Federal Employers' Liability Act (FELA) case. Thomas attempts to distinguish previous cases on the ground that his case presents the question in a new procedural posture. However, the distinction is specious: the Court's pronouncements regarding a decision to grant a directed verdict apply equally to a decision not to grant a directed verdict.

Thomas has waived his right to seek appellate review of the trial

judge's refusal to grant a directed verdict. At trial, Thomas failed to object to the trial judge's refusal to accept Thomas' proffered Instructions 1-A and 3-A. Thomas' omission violates § 8.01-334 of the Virginia Code (1950) and Virginia Supreme Court Rule 5:25, which is similar to Rule 51 of the Federal Rules of Civil Procedure. Furthermore, he has not claimed that his case meets any exception to the rules. Therefore, Thomas, rather than Seaboard, should bear the cost of Thomas' non-compliance with the rules.

Lastly, in this case the Virginia courts ruled in a manner consistent with Federal practice. The Federal courts have consistently stated that a trial court should hesitate to direct a verdict in an FELA case.

Furthermore, Thomas acquiessed in the giving of Instruction 4, which submitted to the jury the issues of negligence, causation, and contributory negligence.

Seaboard's evidence of Thomas' contributory negligence for failing to use his lantern to look for signs of wetness prior to stepping forward sufficed to support an instruction on the issue of contributory negligence. By addressing to the jury the question of causation in Thomas' proffered Instruction 1-A, Thomas conceded the propriety of the submission of the question to the jury. Regarding, negligence, Seaboard presented evidence that no better configuration of drainage pipes could be had, that employees (including Thomas) knew of the need

for increased caution in the cabooses during cold weather, and that Thomas failed to show that Seaboard improperly maintained and inspected the caboose in which Thomas injured himself. From such evidence, a jury reasonably could conclude that Seaboard was not negligent. Therefore, the trial court properly allowed the jury to resolve the issues in Thomas' case.

ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS ANSWERED THE QUESTIONS THOMAS SUBMITS FOR REVIEW.

Thomas' petition for writ of certiorari requests the Court to decide whether a plaintiff is entitled to a directed verdict on the issues of negligence, causation, and contributory negligence in a Federal Employers' Liability Act (FELA) case when it is

said that reasonable fact-finders could only resolve the issues in the plaintiff's favor. (Petition, p. 1.) Thomas admits that the Court has answered his question where a petitioner claims that the trial judge erred in directing a verdict for the defendant under the FELA. (Petition, p. 17). Thomas attempts to distinguish his case on the ground that his case presents the question in the context of a trial judge's decision not to direct a verdict. (Petition for Certiorari, pp. 17, 19.)

However, the Court's pronouncements on this point apply with equal force to a judge's refusal to direct a jury's verdict on an issue. For example, in Wilkerson v. McCarthy, 336 U.S. 53 (1949), the Court reviewed a

trial judge's decision to direct a verdict but stated that "peremptory instructions should not be given 'where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences.'" 336 U.S. at 62 (quoting Washington & Georgetown R.R. v. McDade, 135 U.S. 554, 572 (1890)). Similarly, in Tiller v. Atlantic Coast R.R., 318 U.S. 54 (1943), the Court reviewed a trial court's decision to direct a verdict and, also quoting McDade, stated that "'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury." Tiller, 318

U.S. at 68 (quoting McDade, 135 U.S. at 572).

Thomas does not offer arguments in support of his Questions Presented. Rather, his arguments bear solely upon the sufficiency of the evidence of negligence, causation, and contributory negligence. The Rules of the Supreme Court state that "[t]he petition for writ of certiorari shall contain...[t]he questions presented for review. ... Only the questions set forth in the petition or fairly included therein will be considered by the court." Sup. Ct. R.21.1(a). The rules of the Court also require "a direct and concise argument amplifying the reasons relied on for the allowance of the writ." Sup. Ct. R. 21.1 (j). A petitioner should not receive

a writ of certiorari based solely upon factual arguments when his petition only expressly presents questions of law.

II. THOMAS HAS WAIVED HIS RIGHT TO SEEK APPELLATE REVIEW OF THE TRIAL COURT'S REFUSAL TO DIRECT A VERDICT IN HIS FAVOR ON THE ISSUES OF CAUSATION, NEGLIGENCE, AND CONTRIBUTORY NEGLIGENCE.

At trial, Thomas did not move for a directed verdict on any issue until the conference on the instructions, at which he asked the court for instructions that Seaboard was negligent as a matter of law and that Thomas was not contributorily negligent as a matter of law. Thomas did not object when the court refused to issue the instructions. (Tr., pp. 312-313). Even so, Thomas' requested instruction regarding negligence as a matter of

law explicity provided that the jury would determine the question of causation. Only at the post-trial hearing did Thomas advance the theory that the judge should have directed a verdict on the issue of causation in Thomas' favor.

Virginia Supreme Court Rule 5:25 and § 8.01-334 of the Virginia Code (1950) provide that a party who objects to a trial judge's ruling must state the objection with reasonable certainty at the time of the ruling. The Virginia Supreme Court has stated that Rule 5:25 and its predecessors enable trial judges to rule intelligently and avoid unnecessary appeals, reversals, and mistrials. Woodson v. Com., 211 Va. 285, 288, 176 S.E.2d 818, 820 (1970), cert. denied, 401

U.S. 959 (1971). Virginia adopted the rule "not to obstruct petitioners...but to make more certain the attainment of the ends of justice." Kercher's Adm'r v. Richmond, Fredericksburg & Potomac R.R., 150 Va. 108, 115, 142 S.E. 393, 395 (1928).

The Virginia Supreme Court applied Rule 5:25 and § 8.01-334 to a party's failure to object to a judge's instruction in Spitzli v. Minson, 231 Va. 12, 341 S.E.2d 170 (1986). In Spitzli the trial judge submitted the issues of contributory negligence and proximate cause to the jury without objection from the appellant. Id. at 17, 341 S.E.2d 170, 173 (1986). At the post-trial hearing after the jury returned a verdict unfavorable to the appellant, the appellant requested the

judge to set aside the verdict. Id. at 19, 341 S.E.2d 170, 174 (1986). The judge refused, and the appellant appealed the judge's submission of the issues of causation and proximate cause. Id. The Virginia Supreme Court ruled that the appellant's "failure to preserve his objections at the instruction stage constituted a waiver of any contention that the trial court erred in not ruling as a matter of law upon the issues of contributory negligence and proximate cause." Id. at 18, 341 S.E.2d 170, 173 (1986).

In the context of an appeal from a Federal district court's denial of a petition for habeas corpus, the Fourth Circuit has ruled that Rule 5:25 is purely procedural. Whitley v. Bair,

802 F.2d 1487 (4th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 1618, 94 L.Ed.2d 902 (1987). The court stated that "a federal habeas corpus petitioner's failure to comply with the contemporaneous objection requirement embodied in Rule 5:21 [repealed and reinstated as Virginia Rules 5:17 and 5:25] is a legitimate ground for the application of the procedural default doctrine to bar a federal court's consideration of the petitioner's constitutional claims." Id. at 1501 (citing Murray v. Carrier, _____ U.S. _____, 106 S.Ct. 2639, 2665-2667, 91 L.Ed.2d 397, 413-414 (1986)). The Supreme Court has ruled that it will respect purely procedural state rules. The Supreme Court recognized in Henry v. Mississippi, 379

U.S. 443 (1965), and Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978), that a state has a legitimate interest in preventing parties from needlessly voiding lengthy trials on appeal and that, therefore, a purely procedural state timely objection rule constitutes an adequate and independent state ground for refusing federal review of a state court decision. Henry, 379 U.S. at 447, Tyler, 436 U.S. at 512 n.7.

Seaboard relied upon Rule 5:25 in its arguments to the trial court and the Virginia Supreme Court that Thomas waived any objection to the trial court's instructions by failing to object timely to the trial judge's refusal to grant Thomas' proffered instructions directing the jury's

verdict. Therefore, Thomas' failure to preserve the record should be construed against him, and he should be estopped from seeking federal review of the trial judge's instructions to the jury.

In the context of objections to instructions, Rule 5:25 as applied is equivalent to Rule 51 of the Federal Rules of Civil Procedure, which provides in pertinent part that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." F.R. Civ. P. 51. In Palmer v. Hoffman, 318 U.S. 109 (1943), the Court declared the

rationale for the Federal timely objection rule and the specificity requirement when the Court stated that even "[w]here a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." Id. at 119.

The Federal courts have recognized two exceptions to the Federal rule regarding procedural defaults, but the Court should not employ the exceptions in the present case. In Beardshall v. Minuteman Press Intern., Inc., 664 F.2d 23 (3rd Cir. 1981), the Third Circuit ruled that an appellate court may reverse a verdict on the ground of plain error in a jury charge

in order to prevent a miscarriage of justice. However, Thomas has neither invoked this exception nor argued that the trial court's ruling prejudiced his case in any way. The Supreme Court has stated that the "plain error" standard of review does not bind the Court in cases involving important and novel substantive issues. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256-257 (1981). As shown earlier, though, the Court has already decided the issues which Thomas presents for the Court's consideration. See infra., p.3. Therefore, the present case can hardly be said to present novel issues.

III. IN THIS CASE THE VIRGINIA COURTS RULED IN A MANNER CONSISTENT WITH FEDERAL PRACTICE.

Thomas requests the Court to grant certiorari in his case because "the Circuit Court of Portsmouth and the Supreme Court of Virginia have not followed the standard for the review of evidence as set down by this Court and other Federal Court decisions interpreting the Federal Employers' Liability Act." (Petition, p. 21.) Thomas cites cases which he claims support his argument that the trial court incorrectly declined to remove the question of contributory negligence from the jury. Thomas presents no argument to the Court regarding the submission of the issue of causation to the jury. Thomas does argue that the trial court erred regarding the question of negligence, but he cites

no cases in support of the proposition.

The Federal courts have consistently stated that a trial court should hesitate to give directed verdicts in favor of either party in an FELA case. In Borough v. Duluth, Missabe & Iron Range Ry., 762 F.2d 66 (8th Cir. 1985), the Eighth Circuit Court of Appeals noted that:

> [t]he [trial] court held the railroad was negligent as matter of law. We think that this kind of ruling should be reserved for only the exceptional case. In weighing a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the party moved against, even though contrary inferences might reasonably be drawn....It is true in the present case that the railroad did not attempt to put on any evidence concerning its own negligence. However, a reasonable argument might be made.....

Id. at 68 n.1.

In Dixon v. Penn Central Co., 481 F.2d 833 (6th Cir. 1973), the Sixth Circuit stated, in the context of appellate review of the propriety of submission of a question of contributory negligence to the jury, that "an appellate court should be reluctant to conclude from afar that the trial judge on the scene erred in a factual determination." Id. at 837.

(a) Contributory Negligence

Thomas contends that the trial court in his case did not comply with the Federal standard when it refused to direct a verdict in his favor on the issue of contributory negligence. Seaboard does not deny that the appellate courts properly resolved the cases which Thomas cites regarding

contributory negligence. However, the important factual distinctions which exist between the cases which Thomas cites and the present case tend to show that the trial court in Thomas' case properly allowed the jury to determine the question of contributory negligence.

Thomas cites Borough for the proposition that "if there was no evidence from which the jury could find, [sic] lack of due care by an employee, it is generally fundamental error for the Court to give a contributory negligence instruction." (Petition, p.25.) However, in Borough the defendant based its claim of contributory negligence solely upon the incredibility of the plaintiff's testimony. 762 F.2d at 69. The defendant's only

evidence addressed the plaintiff's medical treatment and damages. Id.

Thomas also relies upon Dixon to show that a defendant may not reach the jury on the issue of contributory negligence merely by asserting that the plaintiff's testimony is incredible. In Dixon the plaintiff operated mechanical levers in a railroad control tower. 481 F.2d at 834. During efforts to repair a switch controlled by one of the levers, the plaintiff injured himself by pushing the lever, which sprang back and injured the plaintiff's back. Id. The defendant failed to argue that a less-hazardous procedure for repairing the switch existed. Id. at 836. The court found that the apparent risk to the plaintiff from attempting to move the lever

was very slight and that the need to repair the switch controlled by the lever outweighed the risk. Id.

Thomas cites Wilson v. Burlington Northern, Inc., 670 F.2d 780 (8th Cir. 1982), cert. denied, 457 U.S. 1128 (1982), for the proposition that an employee's failure to utilize a disused piece of equipment does not constitute contributory negligence (Thomas argued at trial that the lanterns were no longer used inside railroad cars.) In Wilson the plaintiff injured himself while helping to lift a large pan in order to attach it to a hopper car. Id. at 781. Until one year prior to the plaintiff's injury, employees used a jack to lift such heavy equipment. Id. However, the plaintiff "was of the understanding

that the jack could not be used to install the pan [on the hopper]...." Id. The court found that, because the co-workers were prepared to lift the pan manually and several railroad cars would have had to be moved in order to use the jack, "in this situation, [plaintiff] could not reasonably have been expected to decline to carry the pan and to ask that the jack be used instead." Id. at 783. The court ruled that "[u]nder the circumstances present here, [the plaintiff's] decision to help carry the pan was not a matter of free choice nor was it in any way unreasonable." Id.

Lastly, Thomas cites Morran v. Pa. R.R., 321 F.2d 402 (3rd Cir. 1963), and Paluch v. Erie Lackawanna R.R., 387 F.2d 996 (3rd Cir. 1968),

for the proposition that the failure to look for danger when no reason exists to apprehend danger does not constitute contributory negligence. In Morran a wooden walkway, with a rotten underside not visible to the plaintiff, collapsed and caused the plaintiff to fall. Morran, 321 F.2d at 403. In Paluch a rotten wooden telegraph pole, which the plaintiff had climbed pursuant to orders, collapsed under the plaintiff's weight. Paluch, 387 F.2d at 998. The plaintiff in Paluch "was totally inexperienced in the work he was instructed to undertake" and lacked familiarity with the pole's condition. Id. at 999.

Several facts distinguish Thomas' case from all of the decisions cited by Thomas in his petition for writ of

certiorari. The evidence showed that Thomas had worked for Seaboard since 1973 (Tr., p. 208) and that employees commonly knew of the tendencies of drainage pipes in cabooses to "back up" during freezing weather. (Tr., pp. 55, 69-70, 137, 142, 161-162). In spite of the potential presence of water on the floor, Thomas chose not to use his lantern to check for signs of wetness prior to stepping toward the radio. (Tr., p. 234).

Using the lantern would have required neither extraordinary machinations nor permission from Peckinpaugh or Thomas' superiors. Also, contrary to the assertion that the lanterns were no longer used inside cabooses, Thomas testified that he used his lantern inside the caboose

when he first boarded (Tr., p. 251), and Peckinpaugh testified that he used a lantern inside the caboose to examine Thomas' foot. (Tr., p. 44). Finally, because the men each had walky-talkies with which to communicate to the engineer (Tr., page 229), no great need to increase the wall-mounted radio's volume existed.

The foregoing facts support a finding of contributory negligence. Thomas, an experienced employee, knew of facts sufficient to cause him to apprehend danger. The danger was reasonably discoverable because the water lay on the floor's surface. The risk of injury exceeded the need for increased radio-volume, and Thomas could have avoided the risk merely by turning on the lantern at his side.

Therefore, the trial judge properly submitted to the jury the question of Thomas' contributory negligence.

(b) Causation

Thomas presents but does not address the question of causation in his petition for writ of certiorari. However, Thomas should not be able to question the court's submission of the issue to the jury. A portion of Instruction 1-A, which Thomas prepared, conceded that the question of causation was for the jury to resolve: "[i]f you believe...that... [Seaboard's] negligence...caused or contributed in whole or in part, even the slightest, to cause [Thomas'] injury..., then you shall return your verdict in favor of [Thomas]...." Because Thomas' position is that the

trial court should have granted Instruction 1-A (See Petition, pp. 8, iv, v, vi.), Thomas cannot deny that the trial court properly allowed the jury to determine the question of causation.

(c) Negligence

Seaboard concedes that Thomas' evidence sufficed to support a finding by the jury that Seaboard was negligent. However, the evidence did not compel the jury's decision in this regard. In such cases, the Federal courts have consistently stated that a trial judge should allow the jury to determine the question. See infra pp. 25-26, quoting Borough and quoting Dixon.)

Thomas presented evidence that Seaboard and its employees knew that

cabooses had a tendency to accumulate water on their floors during freezing weather. (Tr. pp. 55, 69-70, 137, 142, 161-62). However, Hart, Thomas' only witness that offered an opinion regarding Seaboard's maintenance practices, could not state that Seaboard failed properly to inspect and maintain the caboose in which Thomas rode on the date of his injury. (Tr., pp. 170-171). Furthermore, Seaboard argued that no safer type of drainpipe could be employed in the caboose. (Tr., p. 92; Transcript of Closing Argument, p. 7). Construing the evidence in the light most favorable to Seaboard, the party moved against, one could reasonably infer that Seaboard was not negligent for allowing the condition of the cabooses to persist

when no safer alternative existed and its employees were aware of the potential problems posed by the condition.

Again, Seaboard does not deny that the jury could reasonably have decided that Seaboard was negligent. The jury heard all the evidence and was allowed to make its determination. However, Thomas's evidence was neither uncontested nor so compelling as to direct the jury's verdict. The Court should respect the jury's decision.

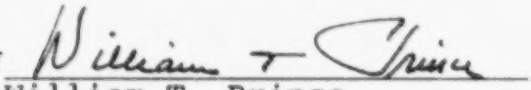
CONCLUSION

For the reasons set forth above, respondent Seaboard Systems Railroad, Inc., respectfully requests the Court to deny petitioner Stephen R. Thomas'

Petition for Writ of Certiorari to the Virginia Supreme Court.

Respectfully submitted,

SEABOARD SYSTEM RAILROAD, INC.

BY 

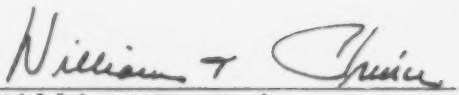
William T. Prince
Williams, Worrell, Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510

CERTIFICATE

I certify that on this 1st day of July, 1988, three copies of the foregoing were mailed, postage prepaid, to:

Raymond H. Strople, Esquire
Moody, Strople & Lawrence, Ltd.
Post Office Box 1138
Portsmouth, VA 23705

All parties required to be served have been served.



William T. Prince
Of Counsel for
Respondent